Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
	)	
AT&T Corporation Petition for Rulemaking To Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

COMMENTS OF XO COMMUNICATIONS, LLC ON FURTHER NOTICE OF PROPOSED RULEMAKING ON SECTIONS IV.A AND IV.C

Lisa R. Youngers
XO Communications, LLC
13865 Sunrise Valley Drive
Herndon, VA 20171
Telephone: (703) 547-2258

Thomas W. Cohen
Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
3050 K Street, NW
Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

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SUMMARY

XO Communications, LLC ("XO') supports the Commission's use of a traditional market power framework based on the collection of extensive price data from providers to examine the state of current and future special access competition. Although the Commission's panel regression approach may have some theoretical merit in determining where price cap local exchange carrier ("price cap LEC") market power exists and the factors that drive it, XO remains concerned that due to the complexity of the special access market, such an approach may not work in practice, especially to predict entry and future competition. Panel regressions should play, at most, a subsidiary role in examining whether price cap LECs currently possess market power in the relevant markets.

The process of defining relevant product and geographic markets is relatively straightforward. Product markets should be defined according to (1) the points connected by the transmission link (*e.g.*, stand-alone channel termination transmission facilities, stand-alone transport facilities, or combinations of channel termination and transport facilities) and (2) the capacity of the link (*e.g.,* TDM circuits: DS1s and DS3s; and (non-TDM) Ethernet circuits at various speeds). Because "best efforts" Internet access service does is not provided with quality of service guarantees, it should not be considered to be an adequate substitute for TDM and Ethernet services. The relevant geographic market for special access services are the point-to-point connections of these circuits. The Commission can either choose to study connections in a limited geographic area (*e.g.* exchange or wire center) or select a random sample of circuits over an entire metropolitan area.

The Commission should gather sufficient information to determine where markets are concentrated and warrant detailed investigation, and to examine whether the price cap LECs have excessive profit margins. To do so, the Commission should gather not only price

information from all providers of special access circuits, but also cost information from the price cap LECs. As a proxy for the costs of the price cap LECs, if not collected, the Commission can utilize the fact that prices for circuits tend to approach marginal costs as the number of suppliers increase to establish "cost benchmarks" for each market by examining routes with the most suppliers.

The terms and conditions of the price cap LECs' special access commitment plans are unjust and unreasonable even without reference to price. Where price cap LECs prices reflect market power, that will only exacerbate the unlawfulness of the price cap LECs' special access offerings. The Declarations of John T. Dobbins and James A. Anderson accompanying these comments demonstrate that the terms and conditions in XO's special access agreements with the major price cap LECs tie up a large part of XO's and other carriers' demands for special access, frustrating the development of competitive market conditions. These commitment plans severely restrict XO's ability to purchase special access circuits or the equivalent from other suppliers and place burdens on XO not faced when XO purchases special access from other providers. At the same time, the commitment plans adversely affect XO's ability as a provider to win both carrier and commercial contracts and to cover its risks adequately when it does.

As an important first step toward fashioning appropriate relief, XO urges the Commission expeditiously to limit the ability of price cap LECs to lock-up more than 50 percent of a carrier customer's special access requirements within their operating territory taken as a whole. The 50 percent level for a particular carrier customer should be based on the lower of a carrier customer's initial monthly spend with the price cap LEC or the monthly average of the previous year's spend and should be based on the aggregate DS1s and DS3s the carrier customer takes from the price cap LEC. Prospectively, adherence to any lock-in provision based on the 50

percent level should be determined based on a carrier customers' purchase of both DS1 and DS3 circuits and Ethernet circuits. This measure would free up carrier customers' demand and engender an environment in which true competition for DS1s and DS3s and their equivalents can emerge.

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ON FURTHER NOTICE OF PROPOSED RULEMAKING
ON SECTIONS IV.A AND IV.C

XO Communications, LLC ("XO"), by its attorneys, hereby files its initial comments in the above-referenced docket.[1] In Section IV.A of the Further Notice of Proposed Rulemaking ("FNPRM"), the Commission discusses different frameworks for analyzing special access markets in areas served by price cap local exchange carriers ("LECs") and the Commission's rules and proposes to adopt a "one-time multi-faceted market analysis…designed to determine where and when special access prices are just and reasonable."[2] In Section IV.C of the FNPRM, the Commission seeks data and information about whether, and in what context, the terms and

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1 *Special Access for Price Cap Local Exchange Carriers and AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 05-25 and RM-10593, FCC 12-153 (rel. Dec. 18, 2013) ("FNPRM").

2 FNPRM, ¶ 12.

conditions for special access services offered by price cap LECs are unjust or unreasonable.[3]

XO is a facilities-based competitive LEC ("CLEC") that purchases (leases) special access circuits from price cap LECs and, where possible, from various competitive providers. In addition, XO supplies special access circuits in certain markets. It therefore has a significant interest in having a robustly competitive special access market, and from that perspective it has participated extensively in the docket since its inception, including by submitting comments on the Commission's *Analytical Framework Public Notice*.[4] In its comments herein, XO supports use of a market power analytical framework, one that focuses on prices and profit margins. It also discusses in detail price cap LEC terms and conditions for special access services and demonstrates how they are unjust and unreasonable. Because these terms and conditions are so harmful to marketplace competition, XO urges the Commission to address this problem right away and provide relief.

I. THE COMMISSION SHOULD USE A MARKET POWER FRAMEWORK TO ANALYZE SPECIAL ACCESS MARKETS

The Commission proposes to use a multi-faceted market analysis "to identify measures of actual and potential competition that are good predictors of competitive behavior"[5] and to use regression analysis "to estimate the effect of competition from facilities-based providers, among other things, on the prices of special access services."[6] The Commission expects this approach

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3 *Id*., ¶¶ 36-37.

4 *See Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, Public Notice, 24 FCC Rcd 13638, 13642-43 (2009). *See* Comments of XO Communications, LLC, WC Docket No. 05-25 and RM-10593 (Jan. 19, 2010), and Reply Comments of XO Communications, LLC, WC Docket No. 05-25 and RM-10593 (Feb. 24, 2010).

5 FNPRM, ¶ 12.

6 *Id.*, ¶ 13.

"is likely to identify all significant current and potential market participants, and consider their effect when assessing the level of competition in a market."[7] In the end, the use of this methodology "will help the Commission determine whether any market participants have market power," as well as helping it "determine the sources of such market power, the likely extent to which it is sustainable over time, and how to construct (where required) targeted regulatory remedies."[8]

XO supports use of a market power framework to examine competition in the special access market. It believes that a focus on market prices of facilities-based providers and the profit margins of the price cap LECs are the best indicators of current and future competition. In theory, the Commission's panel regression approach may have merit in determining market power and the factors that drive it, but XO is concerned that, due to the complexity of the special access market, such an approach may not work in practice, especially to predict entry and future competition. As such, XO proposes that the Commission pursue a traditional market power analysis and use panel regressions, at most, as a supplement to examine whether market power currently exists. XO notes that use of a traditional market power framework will permit a rigorous examination of prices and profit margins particularly because the Commission will collect extensive price data from providers.[9]

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7 *Id.*, ¶ 17.

8 *Id.*, ¶ 12.

9 Thus, it is possible to move beyond conducting just a structural market analysis. Structural analysis may have a role when no data is available and empirical analysis cannot be performed, but it is far less reliable than analysis of actual market data. *See, e.g.* Abbot B. Lisky, Jr., Antitrust Economics, 12 Geo. Mason L. Rev. 163 92003; Timothy J. Muris, Improving Economic Foundations of Competition Policy, Geo. Mason L. Rev. Winter Symposium, Jan. 15, 2003. In particular, the use of actual data enables the Commission to avoid relying in the first instance on such structural tools as number of buildings connected and amount of fiber deployed. Instead, since the Commission will be collecting market data pursuant to its mandatory data request (*See* FNPRM, Appendix

(footnote continued)

A focus on market power, of course, is well-known to the Commission. For instance, in the *Qwest Phoenix Forbearance Order*, the Commission stated that a market power analysis is a "precise inquiry" "designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions, or from acting in an anticompetitive manner."[10] As a result, it decided to stop using a framework based on the retail voice market share plus predictive judgment about market entry and shifted to a market power analysis when considering whether to forbear from enforcement of unbundling obligations.

The Commission's market power analysis follows the framework in the *Horizontal Merger Guidelines* used by the Department of Justice and Federal Trade Commission.[11] It was

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(footnote continued from previous page)

A.), it should be able to more precisely determine the level and extent of competition and the factors that drive it. In particular, the Commission should be able, by using price information, to determine the extent of market power price cap LECs possess.

Use of market data combined with a market power analysis also should lessen misguided policies based on predictive judgments. In the FNPRM, the Commission notes that its special access pricing flexibility rules "were not an effective proxy for special access competition predicted in the *Pricing Flexibility Order*." *See* FNPRM, ¶ 26. The Commission's admission follows on a similar conclusion about its predictive bases for policies in the *Qwest Phoenix Forbearance Order*: "[The Commission] first predicted that Qwest would continue to make wholesale facilities…available to competitors at 'competitive rates and terms.' Second, and relatedly, it predicted that non-cable competitors could 'rely on the wholesale access rights and other rights they have under sections 251(c) and section 271 [to] minimize [] the risk of duopoly and coordinated behavior or other anticompetitive conduct in the market.' Third, it predicted that the areas where Cox currently had facilities would see further investment by Cox and by other competitors even without access to unbundled loops or transport. Upon further consideration, we find that these predictions have not been borne out by subsequent developments, were inconsistent with prior Commission findings, and are not otherwise supported by economic theory." *See Petition of Qwest Corporation for Forbearance pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622 ¶¶ 33-34 (June 22, 2010) ("*Qwest Phoenix Forbearance Order*").

10 *Id.*, ¶ 37.

11 *See* U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines 2 (rev. 1997), available at: www.usdoj/gov/atr/public/guidelines/hmg.htm.

the framework proposed by the legacy AT&T in its 2002 petition for rulemaking.[12] It has been proposed by many CLECs.[13] In sum, it is widely accepted as the analytical framework that will most accurately determine whether and the extent to which competition exists.

XO disagrees with the contention that a market power study cannot be usefully performed especially because the relation between prices and marginal costs is not a reliable indicator in an industry, such as telecommunications, that is characterized by high fixed costs and low marginal costs.[14] This argument ignores the fact that dynamic movements in price-cost margins measure whether a firm's market power has increased or decreased over time. In other words, even assuming that the absolute difference between price and marginal cost does not necessarily reflect a given degree of market power, dynamic movements in price-cost margins reflect changes over time in a firm's ability to exercise market power. Thus, if the Commission determines that the price-cost margins for a price cap LEC have increased significantly during a period, it should view that as powerful economic evidence that the LEC has exercised more market power over that time.

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12 *See Petition of AT&T Corp. for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (Oct. 15 2002). ("In fully competitive markets, market forces drive prices towards costs…Any attempt by a firm in a competitive market to charge prices that would allow it to earn more than a normal, risk-adjusted rate-of-return would cause the firm to lose business to other firms that charged prices that reflect the lower level of return that would still be sufficient to induce investment. It is precisely for these reasons that the very definition of monopoly profit is a return in excess of normal profits.").

13 *See e.g.*, Letter of Thomas Jones, Counsel, tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (July 9, 2009). ("As Dr. Stanley Besen explains…the incumbents' profit margins are the best measure of the extent to which incumbents have market power in the provision of special access.") In this filing, Dr. Besen also makes the important point "that the difference between a competitive and a monopolistic industry is not the direction of, or rate at which, their respective prices *change* during a given period but the fact that a monopolist charges a *higher* price relative to marginal cost than does a competitive firm.")

14 *See e.g.*, Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, Exhibit A, Declaration of Dennis W. Carlton and Hal S. Sider, ¶¶ 57-58 (Jan. 19, 2010).

XO submits that conducting a market power analysis is relatively straightforward. The Commission should define the relevant product market according to (1) the points connected by the transmission link and (2) the capacity of the link. In regard to the points connected, special access circuits are offered as stand-alone channel termination transmission facilities connecting a building to a carrier facility, as stand-alone transport facilities connecting carrier facilities, or as a combination of channel termination and transport facilities. As for the capacity of the link, special access circuits vary by performance (e.g. TDM Circuits – DS1 (1.54 Mbps), DS3 (44.74 Mbps) and Ethernet IP Circuits – 10 Mbps, 100 Mbps, and larger), and each should be examined independently. Finally, because special access services are usually sold with quality of service guarantees, "best efforts" Internet broadband access service should not be included in the same product market, even though it may have some similar performance characteristics.[15]

The relevant geographic market for special access services are the point-to-point connections of these circuits, most of which originate and terminate in a single metropolitan area. While it may be impractical to analyze every point-to-point connection, the Commission can either choose to study connections in a limited geographic area (e.g. exchange or wire center) or select a random sample of circuits over the entire metropolitan area.

Once the Commission defines the relevant markets, it can gather information on market share to determine where a market is concentrated, which, if so, would cause concern and warrant further investigation. The Commission also can proceed to examine whether the price cap LECs have excessive profit margins. In its mandatory data request, the Commission will collect price information from all providers of special access circuits, but it is not seeking to

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[15] *See* Declaration of James A. Anderson, XO Director of Standard Pricing and Analysis, attached hereto as Exhibit 1, ¶ 10 ("Anderson Declaration").

gather cost information from the price cap LECs, which would be necessary to determine their profit margins. While XO is disappointed the Commission is not collecting this data, it submits that should not be an impediment to determining profit margins. Rather, the Commission can use as a proxy for the costs of the price cap LECs the fact that prices for circuits tend to approach marginal costs as the number of suppliers increase.[16] This means that the Commission can establish "cost benchmarks" for each market by examining routes with the most suppliers, and then proceed to calculate price cap LEC profit margins.[17]

Finally, XO disagrees with the price cap LECs' contention that prices from competitors are not a valid proxy for their costs because the LEC's marginal costs are higher than those of competitors.[18] The price cap LECs make two arguments in support of this claim. First, they argue competitors have greater scale economies. The price cap LECs, however, have supplied no evidence to support this allegation. In any event, given their networks are ubiquitous and largely depreciated – in contrast to the relatively recent, limited deployments of competitors – this allegation is not supportable. It also runs counter to their position that their additional costs to turn up circuits are minimal.[19] Second, the price cap LECs claim that their costs are higher because they are required to

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16 Use of these "cost benchmarks" also avoids concerns expressed by price cap LECs about use of accounting costs or the allocation of joint and common costs.

17 As an additional step to provide greater confidence in the results, the Commission can compare these benchmarks with another set of known costs – the Total Element Long Run Incremental Costs ("TELRIC") costs used to establish prices for unbundled network elements. This comparison also will assist the Commission in determining whether a special access market is characterized by "umbrella" pricing (where, even though there may be multiple competitors, prices do not approach marginal cost).

18 *See e.g.*, Comments of Qwest Communications International Inc., WC Docket No. 05-25, RM-10593, at 24 (Jan. 19, 2010).

19 *See e.g.*, Comments of Verizon, WC Docket No. 05-25, RM-10593, Declaration of Dennis Michael D. Topper, ¶ 37 (Jan. 19, 2010). ("ILECs have large fixed network costs and relatively smaller marginal costs to serve additional users.).

serve all areas.[20] However, these LECs can disaggregate special access by multiple zones and ensure that prices in each zone reflect their underlying costs.[21]

II. THE COMMISSION SHOULD ADDRESS SWIFTLY AND PROVIDE RELIEF FOR UNJUST AND UNREASONABLE TERMS AND CONDITIONS CONTAINED IN SPECIAL ACCESS AGREEMENTS OF THE PRICE CAP LECS

The Commission correctly notes that to "understand competition in the special access market," it must look to the terms and conditions offered by price cap LECs for special access services.[22] The Commission requests additional discussion of terms and conditions that are unjust or unreasonable and possible remedies.[23] As explained below and in the attached Declarations of John T. Dobbins and James A. Anderson, the terms and conditions in XO's agreements with the major price cap LECs severely restrict XO's ability to purchase special access or the equivalent from other suppliers and adversely affect XO's ability to provide both carrier and commercial (retail) services. The fact that the price cap LECs can successfully impose these terms and conditions on XO and sustain them over a long period further demonstrates the great extent of their market power in the special access market.

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20 *See e.g.*, Reply Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, at 62 (Feb. 24, 2012). ("Second, Dr. Mitchell's argument assumes that the ILECs' alleged larger scale translates into lower costs. In fact, the ILECs' larger scale is attributable in part to their carrier of last resort and other service obligations that require ILECs' to serve very high cost customers.").

21 *See Access Charge Reform et al*., 14 FCC Rcd 14221, ¶ 62 (1999) ("*Pricing Flexibility Order*"). ("[We] permit price cap incumbent LECs to define zone pricing plans in any manner they wish, so long as each zone, except the highest-cost zone, accounts for at least 15 percent of the incumbent LEC's trunking basket revenues in the study area…the limits we adopt permits a maximum of seven zones, which we believe should provide the ability to adjust to any likely variation in cost conditions.").

22 FNPRM, ¶ 91.

23 *See id.,* ¶ 93.

There are a number of exclusionary terms and conditions in the price cap LECs special access agreements with which the Commission should be concerned, as has been well-documented in the record.[24] Many purchasers of special access circuits from price cap LECs, including XO, have previously alleged in the record in this proceeding that they have entered into agreements with terms and conditions that are exclusionary. Whether or not the terms and conditions are exclusionary will not depend on the revenue or number of circuits at stake. Rather, the Commission needs to determine whether these practices are profit maximizing only because they seek to preclude use of competitive firms. As explained below, the price cap LECs not only seek to employ these terms and conditions to preclude use of competitive firms by XO and others, these practices have more than met their objectives. Competitive purchasers of price cap LEC special access services continue to be chained to them, and competition has been stymied because the majority of the demand in the industry is thereby effectively held hostage. Consequently, these terms and conditions are unjust and unreasonable in violation of Section 201(b) of the Act. The Commission should act swiftly to remedy the situation by adopting the measures limiting the percentage of a carrier customers' spend on special access circuits from price cap LECs that can be tied to long-term volume commitments, as described below.

A. Price Cap LEC Special Access Agreements Impose Anticompetitive Terms and Conditions

Considerations of market power should principally drive the formation of the appropriate regulatory regime. Despite XO's considerable network, it often needs to obtain high-capacity circuits from other providers to provide competitive services to business and enterprise retail

[24] *See, e.g.,* the *ex parte* presentations of Level 3 and tw telecom cited in the *FNPRM*, ¶ 92, nn. 187 and 188.

customers. Where XO does not have facilities in place, in most instances, it obtains its DS1 and DS3 circuits from price cap LECs within their territories, especially in the case of channel terminations.[25] The record in this proceeding makes clear that this is equally the case for other carriers.[26] The facilities-based reach of the incumbents today has no rival, which confers on the price cap LECs market power. This is especially true in the case of channel terminations for business and enterprise customers,[27] but also applies with respect to transport.[28]

XO's agreements to obtain special access from major price cap LECs, such as Verizon and AT&T are taken from, and governed by, these carriers' tariffs. Under these tariff terms and conditions, XO is able to get special access – transport and channel terminations at DS1 and DS3 levels – at rates lower than the price cap LECs' month-to-month rates only by agreeing to buy the vast majority of its special access from the price cap LECs and by committing to a long-term arrangement, typically three to five years. Even then, the prices are significantly higher than

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25 *See* Comments of XO Communications, LLC, on Petitions of AT&T and National Telecommunications Cooperative Association, GN Docket No. 12-353 (filed Jan 28, 2013) ("XO IP Transition Comments"), Declaration of Randy Nicklas, XO's Chief Technology Officer, ¶ 21 ("21. XO remains dependent upon the unbundled elements and special access facilities of AT&T and other ILECs. Today, for approximately 85% of its customers, XO relies upon leased access to last-mile facilities to provide its services or its portion of the services when one of the parties to a service is served by another carrier"). *See also* Anderson Declaration, ¶ 7 (more than 90% of XO's "off net" sales incorporate price cap LEC special access circuits).

26 *See, e.g.*, Letter from David W. Pawlik, Skadden Arps, Counsel to Sprint Nextel Corp. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (April 24, 2012) (90% of Sprint's existing TDM DS1s are provided by ILECs); Letter from Michael Mooney, General Counsel Regulatory Policy, Level 3, Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed June 8, 2012) (Level 3 buys the vast majority of its DS1s from price cap LECs).

27 For a full discussion of this, *see* XO IP Transition Comments at 4-6, 23-30 (noting that the clear market advantages that incumbent LECs have today over their competitors due to their unparalleled facilities-based reach to end user locations, particularly in business and enterprise settings, will not automatically dissipate as the public switched network evolves toward an Internet protocol public communications network).

28 *See* Declaration of John T. Dobbins, XO Vice President of Network and Access Optimization, attached hereto as Exhibit 2, ¶ 4 ("Dobbins Declaration").

what XO would expect in a fully competitive marketplace, based on the rates XO is able to obtain for the small number of circuits that are serviced by other providers.[29] The price cap LECs are typically the only provider in large portions of XO's operating territory and, where that is the case, XO faces a much higher charge in those locations (the price cap LEC's supracompetitive month-to-month rates) unless it agrees to the lock-up commitment. Alternative sources for DS1s and DS3s or their equivalents have not emerged to any meaningful degree for most business and especially enterprise customers, i.e., the types of customers XO serves.[30] In XO's experience, for example, while cable companies have made inroads in providing higher capacity services in some areas, it is almost exclusively for Ethernet services. The cable companies do not provide an alternative source to meet XO's demand for DS1 and DS3 special access.[31] In addition, XO has found that these providers are more often purchasers of XO's special access services than suppliers of special access as an alternative to the price cap LECs.

XO's agreements for special access with price cap LECs contain provisions designed to constrain XO's ability to obtain special access from competitors, assuming such alternative sources are even available. Verizon agreements, for example, require carriers to lock-up high percentages – 90 percent under XO's Commitment Discount Plans with this price cap LEC – of their special access requirements with the price cap LEC to get a reasonable discount from otherwise supracompetitive rates.[32] If XO purchases either too few or too many circuits in a given period, based on a semi-annual review, it must pay premiums over the circuits it actually

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29 *See id.*, ¶ 5.

30 *See id.*, ¶ 6.

31 *See id.*, ¶ 7.

32 *See id.*, ¶ 8. *See* Verizon FCC Tariff No. 1, Section 25.3.4(C)(ii)(2) and Sections 25.3.4(C)(ii)(1) and 25.1.3(A)(5).

takes depending on the extent of the shortfall or the overage.[33] When one of XO's regional agreements with Verizon expire, it faces a 54-67% increase in prices for the special access circuits unless it recommits or moves the circuits to another provider, which it cannot, as practical matter, expect to do.[34]

In those cases where XO exceeds the range in the commitment agreement with Verizon, XO must either increase the maximum of the range, which shifts the minimum number of circuits upward as well, or face a premium for the circuits that are over the maximum.[35] This applies even more pressure on XO to meet the volume commitment to maintain the discount as it faces changing market conditions. Moreover, this aspect of the Verizon agreements makes abundantly clear that Verizon is not truly offering a volume discount. Rather, these commitments are holding demand hostage in Verizon territories, which would in normal marketplace conditions spur entry, and thereby preventing the emergence of competition.

Similarly, AT&T locks-in customers with plans that on the surface look like volume and term discounts. As is the case with Verizon, the AT&T plans are really loyalty plans. To obtain a lower price and a modicum of ability to move circuits with AT&T – meaning cancelling a circuit without an early termination penalty and replacing it with a new one – a carrier must agree to lock-up a high percentage of its circuits with AT&T in longer term arrangements, typically three to five years.[36] However, where the carrier has a commitment plan with AT&T, if more than a certain percentage of the carrier's circuits are terminated, then penalties apply based

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33 *See* Dobbins Declaration, ¶¶ 8-9.

34 *See id.*, 10. The supracompetitive prices of price cap LEC special access outside of the discount plans are especially unconscionable given that the price cap LECs have not made any meaningful capital expenditures for quite some time in TDM facilities and their former investments are largely if not fully depreciated. *See id.*, ¶ 8.

35 *See id.*, ¶ 9.

36 *See id.*, ¶ 12.

on the size of the shortfall. Penalties also apply if the commitment levels are exceeded to a certain extent, unless the customer increases its commitment. Through these terms and conditions, AT&T is able to extract greater commitments from carrier customers leaving less of the carrier's demand free to move so as to help establish a truly competitive market.[37]

The evolution to IP in the markets for transport and channel terminations is ratcheting up the pressure on XO to maintain its minimum commitments under its arrangements with price cap LECs. In many markets, while TDM-based services continue to be in demand, customers are more cognizant and desirous of the cost and network efficiencies of Ethernet services.[38] For this reason, maintaining the minimum numbers of circuits under special access commitment plans with price cap LECs is becoming increasingly difficult.[39] XO has only a limited ability, for example, under its special access commitment plans with Verizon and AT&T to move TDM circuits to Verizon Ethernet platforms to meet the increasing demand and have the Ethernet purchases count against its volume commitments.[40] The Commission should be troubled by this inability to evolve to IP platforms, particularly as AT&T and other price cap LECs seek to assume the role of heralding a transition to such networks.[41]

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37 *See id.*; *see also, e.g.*, Southwestern Bell Telephone FCC Tariff No. 73, Sec. 7.2.22. AT&T plans, rather than being region wide, are state-level agreements in California and the former Ameritech territory. While region-wide agreements provide a small measure of flexibility to carrier customers of AT&T, the state-wide agreements constrict the carrier customers all the more because they have considerably less ability to shift demand from one market to another market as circumstances and opportunities arise for the carrier customer. *See id.*, ¶ 11.

38 *See* Anderson Declaration, ¶ 11.

39 *See* Dobbins Declaration, ¶ 13.

40 *See id.*, ¶ 13. XO has tried to negotiate deals with the price cap LECs that would allow broader portability, but so far it has not succeeded in completing any such deal as the price cap LECs seek to impose onerous terms in return.

41 *See, e.g.,* AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, (filed Nov. 7, 2012).

To gain a greater understanding of the anticompetitive nature of the terms and conditions imposed by the price cap LECs, one only need examine what competitive providers offer. Where XO has agreements with competitors of the price cap LECs for DS1 and DS3 transport and channel terminations, the terms and conditions are materially different. Typically, XO does not have to commit to terms longer than one year for circuits, and the price per circuit typically is already lower than what XO obtains from the price cap LECs on a discount plan, often as much as 40-60% less.[42] If XO does not renew the one year agreement with a competitive provider, under evergreen provisions, the month-to-month price is normally at the same level as the one-year deal.[43] Unlike the price cap LEC commitment plans, in XO's agreements with competitors, there is no imposed volume or term commitment with lock-in provisions. Instead, although in some cases XO's agreements with competitive providers may provide for deeper discounts if volume increases (in real numbers rather than as a percentage of XO's spend), there are no shortfall penalties.[44] In short, XO's dealings with competitive providers are more reflective of what would be expected in a competitive market.

The terms under which XO purchases DS1s and DS3s from other providers – when it can – are similar to those which XO can impose in the marketplace. As noted in the Declaration of James Anderson, XO's customers not only expect a price reflecting competitive conditions but also will not tolerate the sorts of restrictions that price cap LECs impose as a matter of course. Specifically, XO's customers for its special access services will not accept shortfall penalties, restrictions on movement of circuits, and no downturn provisions. Moreover, XO cannot impose

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42 *See* Dobbins Declaration, ¶¶ 19-21.

43 *See id.*, ¶ 20. Even if the agreement allows the competitor to charge more upon expiration, it is XO's experience that the competitor does not. *Id.*

44 *See id.*, ¶ 19.

volume or term commitments on its customers for DS1s and DS3s similar to those imposed by price cap LECs.[45]

B. Impact of the Price Cap LEC Agreements

1. Competition is Adversely Affected

The consequence of the price cap LEC's contract arrangements for special access are far reaching. Effective competition simply cannot emerge, despite the high overall demand, when the potential purchasers have such a large percentage of their needs locked up in inflexible long-term agreements. Because purchasers cannot obtain more than an insubstantial fraction of service from competitive providers, there is not sufficient "free" demand to create conditions for competitors to enter on a meaningful scale – certainly not on a level that might discipline the price cap LEC's ability to exercise market power or to undermine that market power.[46]

2. XO Has Extremely Limited Ability to Move Its Special Access Requirements to Competitive Sources, Where They Exist

As a practical matter, XO cannot transition its circuits at the expiration of a price cap LEC agreement to other providers. Of paramount importance, no competitor could support the circuits as a whole, given that only the price cap LEC has the facilities in place with the reach to meet XO's needs in many locations. As discussed earlier, this is the source of the price cap LECs' market power, especially in the business and enterprise markets. Even if another provider could handle all or a significant portion of XO's demand in a geographic area or region, presumably it would be by reselling price cap LEC circuits, rather than providing services

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45 *See* Anderson Declaration, ¶¶ 12-13.

46 *See* Dobbins Declaration, ¶ 16.

entirely over its own facilities.[47] The transition would take a number of months to a couple of years.[48] During that migration period after expiration of its price cap LEC agreement, XO would have no good choice to satisfy its demand: either XO would have to pay the price cap LEC's undiscounted month-to-month rates or enter into another long-term agreement with the price cap LEC to get the lower rates during the transition and then face the consequences of a potential shortfall below minimum numbers under the discount plan.[49] This creates clear disincentives for the alternative supplier that would have to be overcome by other aspects of the deal.

3. XO Must Devote Considerable Company Resources to Manage Special Access Commitment Arrangements it Has With Price Cap LECs

XO has over twenty price cap LEC special access commitment agreements to manage. Because of the diversity and complexity of the plans, and the extreme monetary penalties XO faces if it does not stay above the minimum and below the maximum volume thresholds, XO must devote substantial attention and resources to managing these plans. XO's need for special access circuits changes from month-to-month and location-to-location, due to gains, losses, and moves of customers. Consequently, XO must carefully monitor circuits – when they are disconnected, when they are turned up, how many are discontinued or turned up in a given month – to ensure it maintains circuits with the price cap LECs at the right levels.[50] Depending upon what the monitoring activity reveals, XO may have to commit a variety of higher-level

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47 *See id.*, ¶ 15. The other carrier may have a disincentive to take on XO as that would tend to increase its minimum commitments, perhaps substantially, with the underlying price cap ILECs.

48 *See id.*

49 *See id.*

50 *See* Dobbins Declaration, ¶ 17. Even if XO maintains overall levels of circuits with AT&T, for example, if in excess of a certain number of circuits are disconnected and then reconnected in a given month, XO may have to incur additional charges. *See id.*, ¶ 12.

personnel to coordinate and develop strategies to implement the multi-faceted measures necessary to keep XO in compliance and to avoid the penalties to the extent possible, e.g., converting UNEs to special access or finding additional customers to keep numbers elevated.[51] Similar monitoring efforts and responses are not required to manage the agreements XO has entered into to purchase DS1 and DS3 special access or equivalents.[52]

III. THE COMMISSION CAN FASHION A REMEDY TO ADDRESS THE HARMS OF THE PRICE CAP LECS AND TO PROMOTE THE EMERGENCE OF COMPETITION

In the end, price cap LECs are able to demand long term special access commitments at large volumes from carriers such as XO because they do not operate in a competitive market. They control the majority of the TDM-based transport and channel termination facilities at issue. The terms and conditions upon which they make those circuits available to other carriers, either for resale purposes or for incorporation into finished telecommunications products, preserves their market position and substantially affects behavior in the market as a whole. Tellingly, the "competition" of the price cap LECs, XO and other competitive providers of DS1 and DS3 equivalents, cannot impose similar commitments on their carrier customers and have a difficult time. The large disparity between the terms and conditions of price cap LECs and their competitors demonstrates unequivocally that there are no market forces disciplining the price cap LECs contracting behavior.

As a solution, XO agrees with an earlier *ex parte* filing made by Level 3 in which that

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51 *See id.*, ¶ 17. Moreover, when XO negotiates a new agreement with a price cap LEC, it must take into account the complex and onerous terms and conditions in its forecasting and planning to be sure it commits at levels it is most likely to need and can manage. *See id.*, ¶ 18.

52 *See id.*, ¶ 22.

carrier endorsed a remedy suggested by Commission staff as a topic for discussion. Specifically, Level 3 explained its position that it would be an adequate (albeit not perfect) remedy to the ills created by the price cap LECs' volume and term commitments if the Commission would cap the amount of special access business a price cap LEC is able to lock-up in its territories to 50 percent of a carrier customer's spend on special access within that price cap LEC's territory.[53] By freeing up carrier customers' demand in this way, the Commission would create an environment in which true competition for DS1s and DS3s or their equivalent might emerge. Competitive suppliers should find that they will more often have ready buyers. More importantly, this sort of remedy creates the prospect that the price cap LECs will begin to experience competitive pressures to lower their rates and soften their other terms and conditions, making the price cap LECs (eventually) a more attractive choice rather than simply an effective prison, as they are today.[54]

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53 *See* Letter of Michael J, Mooney, General Counsel Regulatory Policy, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593, (Oct. 31, 2012) ("Level 3 October 31 *Ex Parte*").

54 As Level 3 explains in its October 31 *Ex Parte*, the Commission has ample authority to prohibit the enforcement of lock-up provisions in both new and existing agreement. *Id.* at 3-9 *citing, inter alia, Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* 22 FCC Rcd 20235 (2007), *aff'd sub nom. Nat'l Cable & Telecomm. Ass'n v. FCC,* 567 F.3d 659 (D.C. Cir. 2009) (prohibiting the use of exclusivity clauses and the enforcement of exclusivity clauses in existing contracts providing single multichannel video programming distributors the exclusive right to provide video services into multiple dwelling units); *Promotion of Competitive Networks in Local Telecommunications Markets,* Report and Order, WT Docket 99-217, Report and Order, 23 FCC Rcd 5385 (March 21, 2008) (prohibiting the enforcement of contracts that restrict the access of other carriers to provide telephone service in residential multi-tenant buildings); *Promotion of Competitive Networks in Local Telecommunications Markets,* 15 FCC Rcd 22983 (2000) (prohibiting the enforcement of contracts that restrict the access of other carriers to provide telephone service in commercial multi-tenant buildings); and *Expanded Interconnection with Local Telephone Company Facilities,* 9 FCC Rcd 5154 (1994), *remanded on other grounds, Pacific Bell v. FCC,* 81 F.3d 1147 (D.C. Cir. 1996) (limiting termination liabilities in then-current contracts on the grounds that "certain long-term special access arrangements may prevent customers from obtaining the benefits of the new, more competitive access environment").

To maximize this opportunity and the benefits that could flow from it, the 50 percent level for a given carrier customer should be based on the lower of the initial monthly spend with the price cap LEC or the previous twelve month's spend on average. Making the measure the lower of these two alternatives would either negate the ratcheting effect under the price cap LECs' current commitment plans that may have trapped the carrier customer at an untenable level of commitment or reflect marketplace changes if a carrier customer has been unable to maintain its initial spend levels due to market changes. Using the lower of these two alternatives will serve the public interest by creating an environment more conducive for the competitive supply of special access and equivalents to take hold.

The 50 percent level should be set based on the aggregate DS1s and DS3s the carrier customer takes from the price cap LEC. Going forward, after the 50 percent level is set, adherence to any lock-in provision should be based on all special access circuits, as well as Ethernet solutions. Although there will be considerable demand for TDM-based DS1s and DS3s for quite some time, there is a growing demand for Ethernet services, as noted above. Carriers such as XO require the flexibility to move their customer's circuits to Ethernet when the customers demand it without fear of incurring penalties.[55]

Finally, if a carrier customer has multiple contracts with a price-cap LEC – e.g., XO has agreements with Verizon East, Verizon West, and Verizon South – the 50 percent level should be determined in the aggregate over all the agreements in accordance with the foregoing principles. In this way, the carrier customers will have the maximum flexibility to take advantage of, and help foster, emerging competition wherever it springs up and grows within a price cap LEC's territory.

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[55] As discussed earlier herein, this also will encourage the transition to all-IP networks.

While the solution promoted by Level 3 and amplified herein by XO is far from perfect, it is a vehicle that could be readily implemented to inject the market with the potential for competition to develop. As the Commission obtains experience with this framework and analyzes the data it will be collecting regarding special access services and markets, it can adjust these measures as the public interest requires.

IV. CONCLUSION

For the foregoing reasons, the Commission should adopt the market power analytical framework, one that focuses on prices and profits margins, described herein. Because price cap LEC terms and conditions for special access services remain unjust and unreasonable and are deleterious to full marketplace competition, XO urges the Commission to provide immediate relief by limiting price cap LECs to locking in no more than 50 percent of a carrier customer's special access requirements going forward.

Respectfully submitted,

XO COMMUNICATIONS, LLC

Thomas W. Cohen
Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
3050 K Street, NW
Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

Lisa R. Youngers
XO Communications, LLC
13865 Sunrise Valley Drive
Herndon, VA 20171
Telephone: (703) 547-2258

February 11, 2013

EXHIBIT 1

FEBRUARY 11, 2013

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
	)	
AT&T Corporation Petition for Rulemaking To Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

DECLARATION OF JAMES A. ANDERSON

1. My name is James A. Anderson. I am the Director of Standard Pricing and Analysis at XO Communications, LLC (XO). I submit this Declaration in support of XO's Comments on the Further Notice of Proposed Rulemaking in the above-captioned Federal Communications Commission (FCC or Commission) proceeding (XO Comments).

2. As XO's Director of Standard Pricing and Analysis, I have responsibility for the evaluation of pricing for all of XO's product portfolio including the development of cost models. XO sells both TDM and Ethernet based data, voice, and private line (dedicated) services to Carrier and Commercial customers utilizing XO's Metropolitan and Inter-City Network. The development of pricing includes the evaluation of XO's cost to support last mile network access. XO's network access pricing includes facilities that utilize XO's "on-net" facilities (*i.e.,* XO's own network) and Type II-based facilities (*i.e.,* resale of other carriers' facilities) provided by the LEC and other alternate vendors. Where XO does not have its own network facilities in place,

XO uses incumbent local exchange carrier (ILEC)-based DS0s to support Ethernet over Copper (EoC) and DS1s for Ethernet over Serial (EoS) transport facilities. When ILEC-based solutions are required, XO utilizes unbundled network elements (UNEs) or special access, depending on the location of the end customer.

3. I have been working in the telecommunications industry for the last 18 years. I started working for XO in 2003. My specific jobs have varied during this time but have always been supporting price and cost models for XO. I have been XO's Director of Standard Pricing and Analysis for the last fifteen months. Prior to working at XO, I was with IDT/Winstar from 1999-2003, where my last role was Director of Business Analysis. Prior to this, I worked for MCI/WorldCom from 1995-1999 supporting Joint Venture Activity. My last role with MCI was Manager of Joint Venture Financial Management.

4. XO provides a variety of services to other carriers and to retail business and enterprise customers, *i.e.*, commercial customers. XO has installed both Metro, *i.e.*, metropolitan area, networks and an extensive nationwide network of its own. Nonetheless, many of XO's services rely on inputs form other carriers, including use of special access and special access-like transport and channel terminations. While XO obtains inputs from other sources, XO's primary suppliers of such inputs, far and away, are the price cap LECs.

5. The commitments XO must make to price cap LECs when purchasing special access impacts XO in a variety of ways as a provider of services to both carrier and commercial customers. Those commitments are explained more fully in the Declaration of John T. Dobbins, also filed with the XO Comments. I refer the reader to that document for a more detailed discussion. In a nutshell, when XO purchases special access from price cap LECs such as AT&T and Verizon, it must enter into certain onerous terms and conditions in order to obtain a

discounted price to make it possible to compete as a provider where it does not have its own facilities. Those terms and conditions regularly include volume and term commitments for periods of three to five years which lock-up large portions of XO's demand. XO is subject, under those commitments, to shortfall, overage, and early termination liability provisions which can lead to substantial economic penalties, in addition to an increase in price for the volume of circuits that make up the shortfall or overage.

6. As a provider, XO sells both "on net" and "off net" special access-type services, including "transport" (or "private line") – meaning transmission between customer-designated points excluding end user locations – and channel terminations – meaning network access to end user locations. "On net" services use XO's own facilities whereas "off net" services rely on the facilities of others. Some facilities may be mixed.

7. When XO sells TDM-based transport and channel termination services "off net" 90%+ of those sales consists solely of or incorporate price cap LEC special access circuits, which XO obtains directly from the price cap LECs or from competitive providers that are reselling price cap LEC special access. In short, price cap LECs' special access facilities are an essential component to XO's "off net" transport and channel termination services. (While I am talking about price cap LECs, the same is true of other incumbent LECs (ILECs) in those markets where XO competes with non-price cap ILECs.)

8. XO provides both Ethernet services that are TDM-based and those which are not TDM-based. The former consist of EoC and EoS services. TDM-based Ethernet products are subject to limitations. EoS maxes out at speeds of about 10 Mbps. While XO's EoC can support higher speeds, EoC also relies on the quality of the copper pairs in much the same way as digital subscriber line (DSL) service. EoC is very distance sensitive – the end user location needs to be

less than two miles from the closest Serving Wire Center (SWC), the copper pairs have to be clean end to end (*i.e.*, no bridge taps), and multiple copper pairs must be available (*e.g.*, five to eight copper pairs are required to support speeds of 20 Mbps). The description I gave above regarding the relative portion of price cap LEC special access circuits supporting XO's "off net" transport and channel termination services generally accurately describe the inputs into XO's "off net" TDM-based Ethernet products.

9. In the case of XO's non-TDM-based Ethernet services (typically 20 Mbps and above) that are sold "off net," XO is predominantly supplied by the price cap LECs. (Again, the same generally can be said of non-price cap ILECs, where XO competes with them.) Approximately 75% of the Ethernet services XO sells "off net" today come directly from price cap LEC sources, and 25% come from alternative providers. Almost none of XO's inputs for pure Ethernet service comes from competitive carriers reselling price cap LEC Ethernet facilities. Typically the alternative vendors' facilities-based prices are better than those of the price cap LECs, and these alternative providers are markedly more responsive than price cap LECs. Unfortunately the geographic reach of the ILEC facilities are considerably more extensive, such that alternative sources of supply to the price cap LECs are not currently available.

10. Special access and Ethernet services are usually sold with quality of service guarantees. "Best efforts" Internet broadband access or transport services do not offer those same guarantees and typically do not appeal to XO's customers, other carriers, mid-sized and large businesses, and enterprises. Therefore, from my perspective, Internet-based transport and access services are a completely different product than special access and Ethernet products even

when, on the surface, Internet-based services may appear to have some similar performance characteristics to these other services.

11. Demand for such "pure" Ethernet services is growing steadily, both among commercial as well as carrier customers. Consequently, XO would like to increase the circuits it can obtain from alternative Ethernet providers, which offer better rates, terms, and conditions, as I explained earlier, when XO cannot provide Ethernet over its own facilities. Having said that, in some cases, because the transition to pure packet-based often requires a considerable investment in new equipment by a customer, XO is able to leverage existing equipment if it can service a customer using TDM-based EoS and the customers bandwidths are not in excess of 10 Mbps. Moreover, because EoS uses special access DS1s as an input, having a customer on EoS would count toward any volume and term commitments XO has under its special access plans with price cap LECs.

12. XO's terms and conditions which it offers to customers differ markedly from what are contained in its volume and term commitments with price cap LECs. As a supplier to smaller commercial customers, XO has standardized terms which it posts on its website which govern most service order arrangements. If necessary, XO will negotiate special arrangements. With carrier and large enterprise customers, XO enters into national master service agreements (MSAs), which are individually negotiated and often have customer-specific terms and conditions. Once the MSAs are in place customers can place orders for particular circuits.

13. For both commercial and carrier customers, while XO signs customers up to contracts that require them to buy a certain number of circuits to obtain a certain price and to commit to a certain period, the terms and conditions are materially different than the sorts of terms that XO faces from the price cap LECs. Unlike the volume commitments that XO has with

price cap LECs, XO's customers obtain rather short term commitments and do not face the sorts of pecuniary penalties that price cap LECs impose on XO and other carriers, although to get the discounts they negotiated, XO does require them to make the purchases they bargained for. (XO's commercial agreements with its retail customers tend to have longer terms, on the order of three years, reflecting the very different purposes to which the circuits are put by retail customers.) Moreover, XO does not require a customer with a volume commitment to purchase a certain percentage of its total requirements from XO; rather XO negotiates the price based on the number of circuits the customer purchases, without reference to what its overall requirements are. Where there is a volume or term commitment, XO has no ability in negotiations to impose down turn provisions of the sort XO is subject to in its agreements with price cap LECs. Cable companies and other carriers demand short terms – typically one-year – because technology, equipment, and other aspects of the communications environment change so rapidly that anything longer would be imprudent.

14. There is a typically a disconnect between the customer circuit contract and the term agreement that XO has with the LEC for the same circuit. In other words, the terms under which XO's buys its inputs are less advantageous than the terms under which it sells the same inputs, which prevents XO from covering the risks of the underlying circuits due to the terms and conditions of the price cap LEC commitment plans. For example, even though XO is able to assess a certain level of early termination penalties (ETPs) on its customers, due to the discontinuity mentioned above, XO is unable to set that ETP high enough to cover the early termination liability of the underlying circuits. Often this is because, reflecting the market conditions in which XO completes sales, the duration of the term of XO's agreements with its customers is shorter than that of the underlying circuits XO purchases from the price cap LECs

under the special access commitment plans. This is to say nothing of the additional risk under the price cap LEC plans associated with failure to meet volume minimums. XO, unlike the price cap LECs, does not have the market leverage to impose such terms.

15. XO also permits carrier customers to keep their rates and move to a month-to-month agreement upon expiration of the one-year terms. Even though the agreement may have a provision allowing XO to charge a higher rate in such circumstances – XO's non-price cap LEC competitors would likely attract the customer if XO tried to enforce that provision. This is in sharp contrast with price cap LECs' commitment plans, which must be renewed by a carrier customer to maintain the rates; otherwise the rates would skyrocket were the circuits to transition to a month-to-month plan. In a word, XO is locked in.

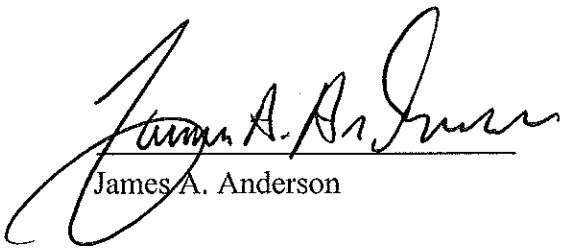
16. As explained in the preceding paragraphs, there is a clear disparity between the terms and conditions underlying XO's principal source of supply for DS1 and DS3 transport and channel terminations – the price cap LECs volume and term commitment plans – and the rates that XO is able to obtain, in turn, with its customers in the marketplace. In short, XO, in general, is subject to being whipsawed by the price cap LEC plans because those carriers are able to impose terms with impunity.

17. This discontinuity of terms between XO's wholesale purchases from price cap LECs and its retail or carrier sales puts tremendous economic pressure on XO. In fact, on numerous occasions, XO fails to make a sale because the benefits of having the customer does not justify the assumption of the risks and potential penalties governing its underlying inputs, whether it be early termination liabilities or other onerous terms and conditions in the price cap commitment plans. XO tries to cover those risks where it can. But rather frequently,

marketplace realities prevent XO from doing so. These circumstances reveal indirectly the onerousness of the price cap LEC discounts volume and term commitment plans.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on February 11, 2013



James A. Anderson

EXHIBIT 2

FEBRUARY 11, 2013

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
	)	
AT&T Corporation Petition for Rulemaking To Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

DECLARATION OF JOHN T. DOBBINS

1. My name is John T. Dobbins. I am the VP of Network and Access Optimization at XO Communications, LLC (XO). I submit this Declaration in support of XO's Comments on the Further Notice of Proposed Rulemaking in the above-captioned Federal Communications Commission (FCC) proceeding.

2. As XO's Vice President of Network and Access Optimization since late 2011, I am responsible for the management of our access cost structure and the procurement of special access. This includes management of all our special access commitment plans with price cap local exchange carriers (price cap LECs), procurement of tariffed access, acquisition of alternative access options, and providing cost for pricing to ensure we have competitive access solutions to sell to our customers. Prior to working for XO, I held numerous access management and transport product management roles at Global Crossing until it was acquired by Level 3

Communications. In these leadership positions over the eight-year period that I was at Global Crossing, I had very similar responsibilities to those I have today at XO in the procurement and management of special access and the management of the company's total access expense and unit costs.

3. In managing XO's access cost structure and the procurement of special access, I am very familiar with the special access commitment plans XO has entered into with price cap LECs. In the price cap LEC special access commitment plans that XO operates under, there are a number of exclusionary terms and conditions that severely constrain XO from pursuing competitive alternatives so as to optimize XO's network operations and cost savings. The June 8, 2012, *ex* parte letter from Level 3 filed in the above-captioned docket, which I have reviewed, catalogs these restrictive terms in great detail. *See* Letter from Michael Mooney, General Counsel Regulatory Policy, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed June 8, 2012) (June 8 Letter). I have reviewed that *ex parte* presentation (in the redacted public version on file at the FCC) and agree that it accurately describes the commitment plans made available by AT&T and Verizon under which XO and many other competitive carriers operate. The magnitude of price increases in Level 3's June 8 Letter accurately describes the magnitude of price increases that XO faces when it experiences shortfalls or overages under the price cap LEC commitment plans to which XO is a party.

4. In those locations where XO does not have facilities in place within price cap LEC territories, XO obtains the vast majority of its DS1 and DS3 circuits from the price cap LECs. The facilities of price cap LECs and other incumbent local exchange carriers (ILECs) are far more extensively deployed in all markets in which XO operates than those of any of their rivals, particularly channel terminations that provide business and enterprise customers with

network access. The price cap LECs also remain the predominant provider of transport within their operating territories.

5. XO obtains its special access commitment plans from the major price cap LECs – including Verizon and AT&T – from these carriers' tariffs. Under these tariff terms and conditions, XO can buy special access DS1s and DS3s, transport and channel terminations, at rates lower than the price cap LECs' month-to-month rates, but rates still much higher than those of competitive access providers by agreeing to buy, or rather "lock-in," for three to five years, the overwhelming majority of its special access requirements with the price cap LECs. Even with the discount XO obtains by making these commitments, the prices for the price cap LEC special access circuits are materially higher than what XO would experience in a fully competitive marketplace, using the rates we can receive from other carriers when XO has the flexibility to purchase from other carriers without penalty under the price cap LECs' special access commitment plans. (Competitively provided circuits constitute a relatively small number of circuits and a small fraction of XO's requirements.)

6. The price cap LECs can extract the commitments from carriers such as XO because they are the only provider, throughout large portions of their operating territories, serving the end user locations, especially in the business and enterprise markets. Alternative sources for DS1s and DS3s or their equivalents have not been available to any meaningful degree for most business and especially enterprise customers in the almost ten years that I have been responsible for trying to find such alternate sources for XO and, before that, Level 3.

7. Cable companies are not a source of alternative facilities to which XO can turn to meet its requirements currently met by special access DS1 and DS3 circuits for the simple reason that cable companies do not provide DS1 and DS3 circuits. And while cable companies do

provide higher-speed "pure" Ethernet alternatives in some locations, cable companies have nowhere near the same reach to business and enterprise locations as do the price cap LECs (and other ILECs) to seriously rival the price cap LECs as the primary supplier of "pure" Ethernet for XO when it cannot use its own facilities.

8. XO's special access commitment plans with price cap LECs contain provisions designed to constrain XO's ability, for the most part, to obtain special access from competitors even when such alternative sources are available. Take XO's agreements in Verizon's three regions, Verizon North, Verizon South, and Verizon West. In each region XO has agreements that cover DS1s and DS3s separately. Verizon's regional Commitment Discount Plans with XO lock-up high percentages of XO's special access requirements, on the order of 90% under five year terms. In return, XO obtains a considerable discount from Verizon's otherwise supracompetitive month-to-month rates, although these rates are still noticeably higher than the rates XO obtains from competitors when it can take them. (The special access rates charges by price cap LECs on a month-to-month basis are inexplicable in light of the fact that the price cap LECs have unlikely made any meaningful capital expenditures in recent years in TDM facilities or plant and the previous investments should be fully or at least largely depreciated. For similar reasons, the types of restrictions price cap LECs place on carrier customers in the special access commitment plans are equally inexplicable.) If XO purchases either too few or too many circuits from Verizon on a regional basis in a given period, based on a semi-annual review, it must still pay a penalty for the shortfall or the overage. For example, when XO falls below the minimum commitment, it must pay the average circuit cost times the number of circuits making up the shortfall, even though it is not receiving any service in return. XO cannot reduce the minimum commitments mid-contract so as to avoid those penalties in the future if its demand falls.

9. In those cases where XO's purchases exceed the commitment range in the Verizon commitment plans, XO must either increase the maximum *and minimum* of the commitment range, or face a stiff premium for those circuits over the maximum. If the minimum increases, XO comes under more pressure to find ways to meet the minimum volume commitment or pay for circuits that it is not actually using. In other words, the risk is greater in the event of a commitment increase, should there be a shift in demand, that XO will suffer shortfall penalties.

10. Finally, under the terms of the commitment plans with Verizon, when one of the agreements expire, the rates will convert to month-to-month levels. This would represent a 54-67% increase in prices over the Verizon discount plans, a circumstance that essentially would compel XO to sign-up for another multi-year commitment plan and tie up the majority of its circuit requirements for DS1s and DS3s for another multi-year period. As explained later, XO does not have a practicable opportunity to migrate any material number of circuits to other providers when a commitment plan expires.

11. AT&T's special access commitment plans lock-in customers with plans that on the surface, like Verizon's plans, look like volume and term discounts. AT&T plans, like those of Verizon, are in effect loyalty plans because the commitments ratchet up (but not down) should XO experience an increase in demand within the geographic area covered by the plans. Not all of AT&T's plans, like Verizon's, are regional. In the old Ameritech region, AT&T offers agreements on a state-by-state basis. XO also has a California-only agreement with AT&T. With the state-by-state plans, XO has less flexibility to respond to changes in its demand in order to meet the minimums, exacerbating the potential for adverse consequences of the volume and

term commitments in those states relative to regional plans. AT&T offers regional agreements in the former Southwestern Bell Telephone and BellSouth operating territories.

12. XO has long term volume and commitment plans with AT&T – Discount Commitment Plans of five years in the states in the former Ameritech region, Term Plan Pricing (with portability clauses) under three-year deals in the former PacBell (California) and Southwestern Bell Telephone regions, and a four-year Area Commitment Plan in the former BellSouth region. By agreeing to lock-up a high percentage of its circuits with AT&T under those plans and to order individual circuits under three-year arrangements (generally) under those plans, XO obtains both a discounted price and a small measure of portability, *i.e.,* the ability to move a certain number of circuits monthly within the scope of the agreement without incurring an early termination penalty. Penalties also apply under the AT&T plans if the commitment levels are exceeded by a certain amount, as in Verizon's plans, unless the customer increases its commitment. Through terms and conditions such as these, AT&T has the opportunity to extract an even greater commitment from XO, which restrains even more XO's ability to find competitive alternatives.

13. Changes in technology are exacerbating XO's constraints under the price cap LECs' special access commitment plans. The demand for Ethernet services is increasing among XO's carrier and commercial customers. As more XO customers seek to move to Ethernet circuits, maintaining the minimum numbers of circuits under special access commitment plans with price cap LECs is becoming increasingly difficult. XO possesses a very limited ability under its special access commitment plans with Verizon and AT&T to move TDM circuits to Ethernet platforms to meet the increasing demand and have the Ethernet purchases count against its volume commitments. Provided that the customer and the customer address remains the

same, the Ethernet circuit will count toward commitments, but in XO's experience that rarely happens. Other Ethernet purchases from the price cap LECs simply do not count toward the commitment levels. (Rates for Ethernet services from the price cap LECs are materially higher than those of competitive providers, but quite often the price cap LECs provide the only alternative due to their more extensive geographic reach to end user locations.) XO is endeavoring to negotiate deals with the price cap LECs that would allow XO to more freely purchase Ethernet replacements and count them toward the commitment plan minimums without penalty. When XO appeared to get close to a deal in the past, the price cap LECs introduce new onerous terms in response.

14. As a practical matter, XO cannot transition its circuits at the expiration of a price cap LEC special access commitment plan to other providers. A threshold obstacle is that no competitor could support the circuits as a whole. Only the price cap LEC has the facilities in place to meet XO's needs satisfactorily in many locations.

15. Even if a competing provider (or group of such providers) in a given geographic area or region could handle all or a significant portion of XO's demand it would do so by reselling price cap LEC circuits for a significant proportion of the demand. For this reason, the other carrier may have a disincentive to ratchet up potentially its own minimum commitments to the underlying price cap ILEC(s) to support XO. Like XO, the other carrier would face the same sort of provisions that penalize the purchaser that fail to meet the minimum commitments or exceeds the maximum numbers of circuits when penalties apply based on the price cap LEC's high month-to-month rates. Moreover, the transition would be lengthy, from a number of months to a few years, during which XO would face either the price cap LEC's undiscounted month-to-month rates if XO didn't renew its special access commitment plan or another long-

term agreement with the price cap LEC – to get the lower rates during the transition. In the latter case, XO would face the potential for a shortfall below minimum commitments once it moves its circuits to the competitor followed by the attendant penalties. In the end, XO can only move circuits to other vendors when we have more circuits than our minimum commitment level.

16. The special access commitment plans, from my vantage point, stifle the emergence of competition to meet the DS1 and DS3 requirements of carriers such as XO. While there is considerable overall demand for special access circuits – and will be for many years to come – competition simply has failed to emerge because most of that demand is locked up for long periods in the price cap LECs' special access commitment plans. Until purchasers as a group are able to obtain a significant portion of their requirements from competitive sources, too much of overall demand will be frozen in price cap LEC special access commitment plans for competition to take a firmer hold.

17. In addition to their other ills, the price cap LEC discount plans impose a considerable burden on XO as an administrative matter. Each month, in each region covered by a special access commitment plan, XO's needs change as a result of gains, losses, and moves of circuits and customers. Accordingly, XO must devote resources to carefully track circuit activity (*e.g.*, disconnections, initiations of service, moves, and so forth) monthly to ensure it maintains circuits with the price cap LECs at commitment levels to avoid imposition of penalties and premium rates. Once the analysis under a given plan is complete and a shortfall or overage appears imminent or possible in the near term, XO commits additional personnel from various business units, mostly under my control, to coordinate and develop strategies to implement measures needed to keep XO compliant and to avoid the penalties. Such plans may include

conversion of UNEs to special access, finding additional customers so as to meet the minimum counts, or looking for alternate sources to which XO can off-load circuits.

18. In a similar fashion, when XO is in the process of renewing or entering into a successor special access commitment plan, it must devote considerable resources to analysis. XO must take into account the complex and onerous terms and conditions of the special access commitment plans in its forecasting and planning process to be sure it can commit to special access purchases at levels it will have to manage under the plans to avoid triggering the penalty and month-to-month provisions.

19. An examination of what other carriers offer provides a stark contrast with the terms and conditions of the price cap LECs' special access commitment plans. XO normally does not have to commit to terms with other competitors longer than one year (sometimes two or three years) to get their best rates. Moreover, shortfall penalties typically are not present in these competitive providers' agreements, and the circuit rates are lower than what XO obtains from the price cap LECs under the special access commitment plans. The difference in rates can be as much as 40-60% less than the *discounted* price cap LEC rates.

20. When agreements with competitors other than ILECs expire, month-to-month rates apply. But, typically, these rates are at the same level as those in the expired deal under evergreen provisions that apply while new arrangements are negotiated. In XO's experience, even where the contract with a competitive provider would allow the assessment of higher rates upon termination, competitive providers often do not invoke those provisions to increase the rates upon expiration. Month-to-month evergreen provisions are, in essence, reward provisions for having made the earlier commitments to the provider. These evergreen provisions stand in strong contrast to the provisions of price cap LECs which use escalated month-to-month rates at

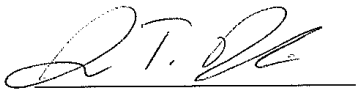
the time of plan expiration to force a new long-term commitment tying up the bulk of a carrier's special access requirements.

21. In XO's arrangements with competitive providers, there is no imposed volume or term commitment, and there are no lock-in provisions. That is not to say that competitive providers never provide for larger discounts as overall volume increases or for longer terms, but there are no minimums, maximums, or penalties. XO's arrangements with competitive providers are more reflective of what I would expect from providers under competitive conditions. The fact that price cap LECs do not offer such terms and conditions strongly suggests that they do not feel competitive pressure from their rivals in the market.

22. Further, XO does not need to dedicate anywhere near the corporate resources to monitor agreements with competitive carriers as it does with the price cap LEC special access commitment plans. Nothing of the sort of effort described above is required to manage agreements with competitors, principally because in their agreements no penalties normally apply (and if they do, they are typically much less severe than those imposed by price cap LECs) and rates do not spike upward when special access commitment plans expire or when customers move or terminate service.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on February 11, 2013



John T. Dobbins